of the cases a guarantor has been held entitled to three kinds of notice:—that his proposal to endorse is accepted; that at intervals new loans have been negotiated with the principal, on the faith of his original endorsement; and that a demand has been made upon the principal, and he has failed to pay. But the doctrine thus concisely referred to in passing, is subject to limitation; and here, as elsewhere, notice is found to be actual or constructive, due or not due, according to the circumstances of the parties. And when a primary and subsisting liability is directly incurred between the principals in a bargain, there is obviously no room for any defence based upon a want of notice that the immediate or consequent obligations are accepted. So that, it being admitted that the minds have met, a subject of a good deal of intricacy, and of only special interest, is avoided.

W. W. WILTBANK.

Supreme Court of Missouri.

JAMES HUNTER *v.* JEFF. CHANDLER.

The judgment on a *quo warranto*, at the suit of the Attorney-General acting for the state, settles the title as between the state and the defendant, but does not fix the rights of another person claiming to be the rightful officer.

If proceedings on such *quo warranto* are commenced during the incumbency of defendant, his subsequent death or resignation, or the expiration of the term of office, will not prevent the information from being prosecuted to judgment.

Title to an office is derived from election or appointment. A commission is merely evidence of title.

An action for money had and received will lie in favor of a person legally entitled or in possession of an office, against one who has usurped or intruded into it, for the recovery of the fees received by the intruder; but where a party claiming the title has not been in actual possession, and his claim is disputed, he must first establish his title by some appropriate legal proceeding. The title to an office cannot be determined in an action for fees.

THIS was an action for money had and received. The plaintiff stated in his petition that during the most of the year 1865, and also in the year 1866 up to the 1st of April, he was city attorney for the city of St. Joseph, duly elected and qualified, so as to be entitled to the accustomed fees and emoluments of the office for the whole time mentioned. That about the 1st day of April 1866 the defendant, without plaintiff's leave or authority, usurped and intruded himself into said office, and from the time last mentioned until about the last of March 1867 defendant continued to usurp and intrude himself into said office, during all of which time he received the accustomed fees and emoluments thereof to and for the use of the plaintiff. That plaintiff was the only

lawful city attorney during the time last before mentioned, and the only person entitled to discharge the duties and receive the emoluments of the office.

It further averred that, at the March Term, 1867, of this court, the attorney-general of the state exhibited an information in the nature of a *quo warranto* in the name of the state, and upon his own relation, charging the defendant with usurping and intruding into the said office, and asking that he be ousted therefrom. That thereupon the defendant, in order to avoid a judgment of ouster, did immediately vacate the office and resign all right to the same; and that when the case came on to be heard, defendant disclaimed that he was holding said office or was in possession thereof, and presented his resignation duly approved by the mayor of St. Joseph, and that in consequence of said resignation the attorney-general took no further steps with the case.

The petition then alleged that the defendant, whilst so exercising the duties of the office, received fees and emoluments accruing therefrom to the amount of $3000, and judgment was asked for that sum.

This petition was demurred to, and the demurrer sustained by the court below.

The opinion of the court was delivered by

WAGNER, C. J.—Whether defendant resigned and vacated the office to avoid a judgment of ouster at the instance of the state, is not material as respects the rights of the plaintiff. The information was by the attorney-general on behalf of the state to protect the public against usurpation and intrusion, and in such a proceeding the private rights of a third party claiming the office are not determined or passed upon. The state, acting through its law-officer, does not establish the rights of private persons to an office; it only maintains its own dignity and protects the public interest by ousting those who usurp or intrude into offices and unlawfully exercise their franchises. Where a private person wishes to have his right to an office adjudicated, the statute points out the course to pursue. It provides that the information shall be prosecuted at his relation, and shall be proceeded upon in such manner as is usual in cases of information in the nature of a *quo warranto:* 2 Wagner's Statutes 1133, sect. 2.

As the proceedings generally raise questions of fact, and the parties have an ample remedy in the Circuit Court, and this court being chiefly an appellate tribunal, it will refuse, except under peculiar circumstances, to allow any information to be filed to inquire into the title of a private person to an office: *State* v. *McIlhaney*, 32 Mo. 379; *State* v. *Lawrence*, 38 Id. 535; *State* v. *Buskirk*, 43 Id. 111.

Had the attorney-general proceeded with the information filed by him to a final determination, the judgment would have fixed the rights of the defendant to the office, but not those of the plaintiff. The plaintiff was no party to the record. The information was not at his relation, and his title could not have been passed upon. But the resignation of the incumbent, or even the termination of the office, would not prevent the information being prosecuted to a final judgment, if the proceedings were commenced prior to the resignation or the expiration of the term: *Com.* v. *Smith*, 45 Penn. St. 59; *People* v. *Hartwell*, 12 Mich. 508.

The law will not permit the ends of justice to be defeated at the mere volition of a party who seeks to elude its judgments by changing his condition for his own advantage. I think, therefore, that an information in the nature of a *quo warranto* to try the right to a public office may be tried after the term has expired, or the officer holding it has resigned, if the information was filed or the proceeding begun before the resignation took place or the term expired.

The question has been mooted whether an action of this character was maintainable. About this I have no doubt. The authorities abundantly establish the principle that an action for money had and received will lie in favor of a person really entitled to an office, against one who has usurped and intruded into the same, for the recovery of the known and fixed fees that such intruder may have received: *Glascock* v. *Lyons*, 20 Ind. 1; *Powell* v. *Millbank*, 1 T. R. 399, n.; *Boyter* v. *Dodsworth*, 6 Id. 481; *Saddler* v. *Evans*, 4 Burr. 1984; *Lightly* v. *Clonston*, 1 Taunt. 113; *Allen* v. *McKean*, 1 Sumn. 117; 1 Selw. N. P. 81; 1 Chitty's Pl. 112.

The doctrine which underlies these cases, and upon which the rule rests, is, that if one man receives money which ought to be paid to another, or belongs to him, this action for money had and

received will lie in favor of the party to whom of right the money belongs.

In *Allen* v. *McKean*, *supra*, Judge STORY held that there was no difficulty in maintaining the suit, simply because it involved a trial to the office, if the party had once been in possession. In that case Allen the plaintiff was, and for some time previous to the commencement of the suit had been, President of Bowdoin College, and he had been illegally superseded as such president. He prosecuted the action to recover certain fees due him as such officer, and the judgment of the court was that he was entitled to recover. But there he was incumbent and had been unlawfully ousted. In the present case it is not shown that the plaintiff was in the actual possession at the time the usurpation and intrusion complained of took place. There is no direct or express allegation that the plaintiff was inducted into the office at the time. But there is an averment that the defendant was in under a commission, for it is stated he resigned the same with the approval of the mayor. This shows that a contest, or some kind of litigation, was necessary to determine to whom the office really belonged. It has been often decided by this court that the officer derives his right to the office from his election or appointment, and that the commission is simply evidence of his title. Where he has been fairly and legally elected his right at once becomes absolute, and if another person by unjust, false, or fraudulent means gets possession of the office, exercises its duties and enjoys its franchises, he will be responsible to the rightful occupant for all the accustomed fees and emoluments when the right is finally established.

This brings us to the next question, namely: whether the title to the office can be determined in an action of this kind when the party claiming sues for the fees, or whether he must first establish his right by some appropriate legal proceeding. Where the party had once been in possession and he was unlawfully ousted by an intruder, there might be no difficulty in applying the rule laid down by Justice STORY in *Allen* v. *McKean*. But where such was not the fact, and the title was in doubt, such a principle would be productive of the greatest confusion, and would lead to endless and unnecessary litigation. I am aware that there are very respectable authorities holding that the title to an office may be determined in a suit for fees. The old Eng-

lish cases strongly sustain this view; but I think that the better doctrine and reason is to the contrary.

In the case of *The State to use of Bradshaw* v. *Sherwood et al.*, 42 Mo. 179, we decided that an action would not lie to recover damages for being deprived of an office when the plaintiff did not claim the office and another person was in possession. That it was necessary for the plaintiff first to establish his right in a proceeding for that purpose in order to show that he was damnified. With that decision we are satisfied, and see no good reason for departing from it. The right or title to an office ought not to be determined in a civil action of this kind. The party should not be permitted to sleep on his rights and let another person perform services, and then claim the compensation which was the result of the labor performed. When the defendant obtained possession of the office, the plaintiff should have either proceeded to contest his right or resorted to his *quo warranto*, and upon judgment rendered in his favor he then might have maintained his action for the recovery of the fees and emoluments of which he had been unjustly deprived. But, as no steps were taken to establish his title, and it has not even yet been established, I think the judgment of the lower court was right, and should be affirmed.

Judgment affirmed.

In addition to the point decided in the above case, concerning the right of an officer to recover the fees of office from one who illegally usurps the same; there is another closely connected therewith of hardly less importance, and which at times has excited considerable comment. That is, the force and effect of the acts of an officer *de facto*, as distinguished from those of one *de jure*. It was held at a very early day that in the case of sovereign powers, the necessities of mankind demanded that the acts of a government *de facto*, should be held valid and binding, as otherwise there would be no security for life, liberty, or property, in times of civil commotion or rebellion. This doctrine found expression in the form of a statute, as long ago as the reign of Edward IV. of England; in Statute I Edward IV., c. I., the three former kings, Henry IV., V. and VI., being styled "late kings of England in *dede* and not of *ryght*," and subsequent statutes excused obedience to a king *de facto*, whose acts for the time being are expressly recognised as valid. It may therefore be safely asserted that whenever a power or a government is able to maintain itself in authority, it is necessary for the peace and development of society that such government or power should be recognised *pro tempore* as the legal power, and full effect and validity given to all acts under it.

This fundamental rule, or maxim as it may be called, was soon applied to the case of officers of inferior authority; and the acts of an officer *de facto*, held

as good, valid, and binding, as those of one *de jure*. In *Knight* v. *Wells*, Lutw. 508, the act of a mayor *de facto*, was held good, though he was not lawfully mayor. And so the admission of a steward to copyhold lands was approved, though the steward had no authority, on the ground that he was an officer *de facto*: *Harris* v. *Jays*, Cro. Eliz. 699; see also *O'Brien* v. *Kerivan*, Cro. Jac. 552. Modern cases have fully confirmed the same doctrine: *Scalding* v. *Lorant*, 66 E. C. L. 686. In this country the rule is well established, that all acts of an officer *de facto*, are valid as far as regards third parties. Judge KENT, in *McInstrey* v. *Tanner*, 9 Johns. 135, saying the acts of officers *de facto* are often valid as far as they concern the rights of third parties: *The People* v. *Cook*, 4 Seld. (N. Y. Ct. Appeals) 85. In Massachusetts, in *Commonwealth* v. *Fowler*, 10 Mass. 301, PARSONS, C. J., says, "so long as officers are such *de facto* under an appointment, their official acts are valid." *Coolidge* v. *Brigham*, 1 Allen 335. In Pennsylvania it was held in *Cornish* v. *Young*, 1 Ash. 153, that the judicial acts of an alderman *de facto*, possessing a commission legal on its face, can only be inquired into in a suit where he is a party, and in *Riddle* v. *Bedford*, 7 S. & R. 392, DUNCAN, J., says, "there are many acts done by an officer *de facto* which are valid. They are good as to strangers and all those persons who are not bound to look further than that the person is in the actual exercise of the office, without investigating his title." See also to the same effect *McKim* v. *Somers*, 1 Penna. 297; *Keyser* v. *McKissan*, 2 Rawle 139; *Com.* v. *Slifer*, 1 Casey 23; *City of Philadelphia* v. *Given*, 60 Penna. 136; *Burke* v. *Elliott*, 4 Iredell 355 (N. C.); *Plymouth* v. *Painter*, 17 Conn. 586; *St. Louis Co. Court* v. *Sparks*, 10 Missouri 117; *State* v. *Perkins*, 4 Zabriskie 409 (N. J.); *Pritchett* v. *People*, 1 Gilm. 525. The only qualification of the foregoing cases being that such officer *de facto* exercises the duties of his office under color of an appointment or election, and not as a mere usurper who undertakes the office without color of right: *Plymouth* v. *Painter*, *supra*. There is no better definition of an officer *de facto* than that laid down by Lord ELLENBOROUGH, in the case of *The King* v. *The Corporation of Bedford Level*, 6 East 368. "An officer *de facto*," he says, "is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." And as to what constitutes such an officer, was ably defined by SUTHERLAND, J., in *Wilcox* v. *Smith*, 5 Wend. (N. Y.) 231, where he says, "that an individual coming into office by color of an election or appointment is an officer *de facto*, and his acts in relation to third parties are valid until he is removed, although it is conceded that his election or appointment was illegal. The mere claim to be a public officer, and the performance of a single or even a number of acts in that character, will not constitute an individual an officer *de facto*. There must be some color of an election or appointment or an exercise of the office, and an acquiescence on the part of the public for a length of time, which affords a strong presumption of at least a colorable election or appointment." This seems to be a true and accurate definition, and was followed in *The People* v. *Tieman*, 8 How. Pr. (N. Y.) 359, where ALLEN, J., says, "a mere claim to be a public officer is not sufficient, there must be a colorable right to the office." See also to the same effect the case of *Plymouth* v. *Painter*, 17 Conn. 585, cited above, and *The State* v. *Brennan's Liquors*, 25 Conn. 278. A like rule is laid down in *Pritchett* v. *People*, 1 Gilm. 525, the judge relying on the case of *Wilcox* v. *Smith*, as containing the true principle of what con-

stitutes an officer *de facto*. From the foregoing synopsis it will appear to be almost indisputably established that the acts of an officer *de facto* are valid and binding as regards third persons, unless where they enure to his own advantage, and that it is only necessary to constitute such an officer, that he should have some colorable title to the office he exercises, and not be a mere usurper.

As regards the principal point in the foregoing case of *Hunter* v. *Chandler*, on the right of the officer who is legally elected to an office, to recover the fees of such office from the party who was illegally in possession, the authorities are less numerous and scarcely as satisfactory.

In *Boyter* v. *Dodsworth*, reported in 6 Term Rep. 681, Lord KENYON says, "where there are regular fees due for duties performed in an office, and one should *intrude* into such office, the rightful incumbent may maintain an action for money had and received, against such intruder, to recover the fees." And such is the ruling in the principal case of *Hunter* v. *Chandler*, where the point is fairly met and determined; WAGNER, C. J., who delivered the opinion of the court, saying, "as to the question whether an action can be maintained by an officer for the fees of his office, against a usurper, I have no doubt the rule rests upon the principle, that if one man receives money which ought to be paid to another, the latter may maintain an action for it."

There the party against whom the action was brought was an intruder, apparently without any claim of title; and the general doctrine was laid down, that the right to an office being derived from election or appointment, if after such election or appointment another *unlawfully* usurps or *intrudes* into such office, he is responsible to the rightful claimant for all the accustomed fees received by him and this was only so far qualified, that it was held necessary for the rightful claimant to first establish his right by legal proceedings.

It may readily be admitted, that where, as in the foregoing case, the occupant is plainly an *intruder* or *usurper*, he should be responsible to the lawful claimant for the fees received while unlawfully in possession. But the case is somewhat different, and the rule may be unnecessarily severe if applied to a candidate, apparently legally elected to an office, the duties of which he is performing conscientiously and ably, should it afterwards be found that his election was the result of a fraudulent vote, of which he was totally ignorant.

On the one hand it may be said, that the emoluments of office only belong to him who is ultimately decided to have been *legally* elected, while on the other it may be justly urged that the office must be filled lest the public suffer, and as no one but he who is apparently elected, can discharge the duties, he is entitled to compensation for the time he is in office.

The point did not arise, and therefore was not decided in *Hunter* v. *Chandler*, for there great stress was laid on the fact that the party in possession was an *unlawful* intruder and *usurper*, so that the case is no authority for the doctrine that the fees always belong to the party ultimately entitled to the office.

In *Douglass* v. *The State ex rel. Wright*, recently decided in Indiana and reported in 31 Ind. 479, where an information under a statute was brought by a county auditor duly elected to fill a vacancy, against the party who had been appointed and who refused to surrender possession, the question arose as to whether the relator in the information could recover the fees and emoluments of the office, during the time the appointee, Douglass, retained possession after Wright's election, and also if the former was in any event

entitled to retain from the gross receipts the amount paid out for necessary clerk hire during that period.

It was held by the majority of the court, ELLIOT, J., delivering the opinion, "that the relator was entitled to recover all the fees and emoluments received by the party in possession, he having *unlawfully* held the possession without the assent of the relator either express or implied, and as he was an *intruder*, and performed the labor against the protest and express will of the relator, the law would not imply a promise to pay any compensation for his services, and hence he was not even entitled to claim a deduction from the fees received by him, for his necessary clerk hire. This case, at first, seems certainly to go the length of deciding the point, that one performing the duties of an office to which he is not *legally* entitled, has no claim to any fees therefor, and if he collects them will be responsible to the lawful claimant. On a closer inspection, however, it will be seen that the appointee, Douglass, was *clearly* an *intruder* after the election and commissioning of the relator, and so far may be said to have fraudulently received the fees of his office. This view is also strengthened from the fact that in the beginning of his opinion, the judge says that "Douglass was a mere *intruder* after the relator Wright was elected, and the exercise of the office was a usurpation. If this was in any degree the basis of the decision, it would certainly be no authority where the party in possession was apparently legally and duly elected.

In the foregoing opinion of ELLIOT, J., the cases of *Glascock* v. *Lyons*, 20 Ind. 1, and *United States* v. *Addison*, 6 Wallace 291, were cited as confirmatory of the views therein expressed. The first of these cases was where one Glascock sued Lyons for the fees of the office of sheriff of Fountain county, averring that he, Glascock, had been duly elected sheriff, but that Lyons, by *false* and *fraudulent* means and practice, had secured a certificate of election and had been commissioned and qualified. These facts were admitted to be true. And the court in delivering their opinion say: "Taking the facts as stated to be true, Glascock is entitled to recover the fees received by the defendant, and there is no good reason in conscience why the defendant, *under the circumstances*, should have even a bare compensation for his services during the time he performed the duties of the office." There is manifestly an intimation here, that under other circumstances the party who performed the services or duties of the office might be entitled to some compensation, that is, where there was no proof of *false* or *fraudulent* practice on the part of the officer in possession; at any rate it is not binding as an authority on a different state of facts.

In *United States for the use of Crawford* v. *Addison*, Crawford, being the mayor of Georgetown, was a candidate for re-election; Addison was the opposing candidate. Crawford was returned as elected, but the city councils, on a count of the votes made by themselves, declared that Addison was really elected, and he was accordingly sworn into office and entered upon its duties. On a *quo warranto* against Addison there was a judgment of ouster. He took a writ of error and executed a bond in $3000, to answer all damages if he failed to make his writ good. The writ was subsequently dismissed, and Crawford brought suit on the bond to recover the amount of salary received by Addison from the time of the date of the bond to the dismissal of the writ of error. The court held that he was entitled to recover. Here the claim was only for the time Addison held the office, after it had been decided that he was not legally entitled, and did not touch the question as to the previous time during which he discharged the duties of mayor.

In both of these cases it will be per-

ceived that the point was not decided, as to whether the incumbent of an office, who is afterwards determined not to have been *legally* elected, is entitled to retain any of the fees or emoluments received by him while in office. In *Dorsey* v. *Smythe*, 28 California 21, though the exact point did not fairly arise, the broad principle was asserted, that the salary is incident to the office, and not to the exercise or performance of the duties. In this case Platt and Dorsey were opposing candidates for the office of district attorney. Platt was declared elected, but Dorsey contested his election on the ground of illegal votes, and the contest was determined in Dorsey's favor, who had previously qualified and demanded the possession of the office from the then incumbent, but was refused. Upon suit brought to recover the salary, not from the incumbent, but from the county, it was held that he, Dorsey, was entitled to recover such salary from the date of his election, the court saying: "that if it should appear that the party demanding the office had at the time a title thereto the party in possession could claim nothing on the score of services rendered, for on the determination of the question he is a usurper *ab initio*, the salary is incident to the office and not to the performance of the duties."

This doctrine was affirmed in *Stratton* v. *Oulton*, 28 California 44, and still more recently in the case of *Carroll* v. *Liebenthaler*, not yet reported, where RHODES, J., in his opinion, says: "The principle that the salary annexed to an office is incident to the *title* to the office, and not to its occupation and exercise, is determined by the cases of *Dorsey* v. *Smythe* and *Stratton* v. *Oulton*."

In *City of Philadelphia* v. *Given*, 60 Penna. St. 136, the plaintiff below had received a certificate of election as city commissioner, and had acted as such for seven months, when on termination of a contest it was decided that he had not been elected. He then brought suit for his salary during the time of his service. The court held that he could not recover, because he had not qualified according to law by giving security; but THOMPSON, C. J., in a concurring opinion, placed his judgment on the broad ground that the right to salary was dependent on the legal title to the office.

Mott v. *Connelly*, 50 Barb. 516, is a somewhat contrary opinion, inasmuch at least, as it is there held, by SUTHERLAND, J., that certain *de facto* tax commissioners were entitled to recover their salary from the city controller, for the time they performed the duties of the office, notwithstanding it was opposed by the tax commissioners who claimed to be the only ones legally elected, the judge saying: "The commissioners in office cannot be said to have usurped their office or intruded without *color of right* or title. The question of right must be determined in another action; and until it is, the present commissioners are entitled to the salary."

Such is a brief outline of the cases on this subject, from a review of which it will doubtless be considered that the action for money had and received will lie by the party who is legally entitled to recover the fees and emoluments of office, against one who *usurps* or *intrudes* into the same. And unless the opinions of the judges in *Glascock* v. *Lyons*, *Dorsey* v. *Smythe*, and *Carroll* v. *Leibenthaler*, are deemed mere dicta as regards the points not directly before them, will probably be construed as countenancing the broader doctrine, that such action will lie in all cases, where the party who is *ultimately* decided to have been elected, sues the party in office for the fees of such office. However this may be, there is no case in which the point has been directly decided, and if the question should arise, it will be found to be untrammelled by any absolute authority.

W. W. WISTER, Jr.